**Ken-Crest Services *and* Pennsylvania Social Services Union, Local 668 of Service Employees International Union, AFL–CIO, CLC, Petitioner.** Case 4–RC–19759

August 27, 2001

## DECISION, DIRECTION, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in an election held on January 12 and 13, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election.[1] The tally of ballots shows 55 for and 58 against the Petitioner, with 32 challenged ballots, a number sufficient to affect the results of the election.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings and recommendations.[2]

The Employer provides residential care to developmentally disabled individuals at approximately 62 group home settings located throughout southeastern Pennsylvania and Delaware. The Employer's Suburban Residential Division of Adult Services, also known as the "Suburban Division," the division at issue here, is comprised of 35 group homes located in Chester, Montgomery, and Berks Counties, Pennsylvania. Michael Walker, the Employer's director of day-to-day operations for southeastern Pennsylvania, oversees the Suburban Division. The Employer employs two community living directors in the Suburban Division who report to Walker. At full staffing levels, eight project directors report to the community living directors.[3] The project directors are responsible for several group homes that they visit one to three times a week. Group homes are staffed 24 hours a day, 7 days a week, by a program manager and a staff of two to five resident advisors.

The Petitioner seeks to represent a unit of approximately 144 full-time and regular part-time employees employed in the Suburban Division, including approximately 110 resident advisors, 33 program managers,[4] and 1 assistant program manager.[5]

In his report,[6] the hearing officer found that the Employer failed to meet its burden of proving that its program managers are supervisors within the meaning of Section 2(11) of the Act. See *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861, 1866–1867 (2001) (holding that burden of proof is on party asserting supervisory status). We agree. For the reasons set forth below, contrary to our dissenting colleague, we find that the Employer has failed to establish that the program managers are statutory supervisors because they can issue verbal (i.e., oral) warnings and adjust minor grievances.

### Verbal (Oral) Warnings

The Employer has a progressive disciplinary system that commences with general counselings; progresses through verbal warnings, written warnings, and suspensions, with and without pay; and ends with termination.[7] According to Lois Johnston, the Employer's human resources coordinator, program managers had until recent years been authorized to issue written warnings to resident advisors. However, it is undisputed that program managers are currently authorized by the Employer only to issue general counselings and verbal warnings to resident advisors. They are not authorized to suspend or discharge resident advisors.

In the case of both general counselings and verbal warnings, the program manager speaks to the employee about the identified deficiency. With respect to counselings, there is no formal documentation, and nothing goes into the employee's personnel file. An employee may receive multiple counselings without any further disciplinary steps ever being imposed. According to Walker, documentation of any verbal warning issued by a program manager is maintained in the employee's personnel

[1] By order dated December 29, 1999, the Regional Director's Decision was amended to permit the program managers to vote by challenged ballot.

[2] The Employer has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

In the absence of exceptions, the Board adopts, pro forma, the hearing officer's recommendations to overrule the Petitioner's Objections 2–4 and 7–8.

[3] At the time of the preelection hearing, the Employer employed six project directors.

[4] Two of the program manager positions were vacant at the time of preelection hearing.

[5] At the time of preelection hearing, the Employer was phasing out the position of assistant program manager. There is no contention that the assistant program manager is a statutory supervisor.

[6] The hearing officer took administrative notice of the transcript record in the preelection hearing and of the Regional Director's Decision and Direction of Election, and the subsequent Board Order amending it.

[7] The Employer's progressive disciplinary system is found in its policy and procedures manual. In its written form, there is no mention of general counselings.

file.[8] However, there is no standard form for the program manager to fill out and Johnston, who maintains the Employer's personnel files, admitted that a verbal warning may not be noted in an employee's personnel file.

According to Johnston, there is no formal policy concerning how many verbal warnings will warrant an issuance of a written warning. Thus, there is no automatic progression from a verbal warning to a written warning. In contrast, the Employer's formal policy provides that three written warnings within a year will result in an employee's discharge. Written warnings can only be issued with the explicit approval and signature of a project director or higher authority. Johnston, who types up the written warnings, testified that a verbal warning will be referenced in the written warning, if one preceded the issuance of a written warning. None of the written warnings introduced into evidence by the Employer referenced a documented verbal warning.[9]

Based on these facts and consistent with the case law, we agree with the hearing officer that the program managers' limited role in the disciplinary process is nothing more than reportorial.[10]

In finding otherwise, our dissenting colleague cites language appearing on the face of the documentation of verbal warnings entered into evidence, which indicates that any further violation of company rules will result in further disciplinary action up to discharge. However, the Employer has failed to demonstrate that any actual consequences flow from the documented verbal warnings issued by its program managers. As indicated above, there is no automatic progression from a verbal warning to a written warning, and no written warnings were placed into evidence that even referred to previously documented verbal warnings. Thus, we find that the verbal warnings issued by the program managers here have no clear connection of any kind to other disciplinary measures.[11] Unlike our colleague, therefore, we find that the program managers do not play an integral role in the progressive disciplinary system simply because of their authority to issue general counselings and verbal warnings.[12]

Adjusting Grievances

Our dissenting colleague also asserts that the program managers possess Section 2(11) authority to adjust grievances. We disagree. The Employer has a written grievance procedure stating, that "prior to initiating the [grievance] process," employees are directed to discuss the matter with "his or her immediate supervisor." Under the Employer's policy, "if a discussion with an employee's supervisor does not result in a satisfactory resolution, the employee can file a written grievance with the Division Director."[13]

As discussed by the hearing officer, the record reflects little evidence of any actual adjustment of grievances by the program managers. In the instances where program managers have taken an active role in grievances raised by resident advisors, their efforts have amounted to little more than relaying, or offering assistance in relaying, the grievances to upper management or simply offering advice or suggestions.

For example, in one case, Program Manager Dawn Grunder testified that Shirley Henderson, a resident advisor, complained about her low salary given her job responsibilities. Although Grunder explained that she had no authority to grant Henderson a pay raise, Henderson

[8] The record indicates that in the 2 years prior to the election four verbal warnings issued by one program manager were documented and placed in personnel files. Emp. Exhs. 12 and 17 (preelection hearing).

[9] Emp. Exhs. 12, 14–19 (preelection hearing).

[10] See *Vencor Hospital-Los Angeles*, 328 NLRB No. 167 (1999) (ability to issue oral warnings in itself does not demonstrate supervisory authority); *VIP Health Services v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (mere reporting is insufficient to establish that nurses effectively recommend discharge or discipline); *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 817 fn. 20 (2d Cir. 1980) (authority to do no more than orally counsel and reprimand employees is not supervisory*)*. Accord: *Waverly-Cedar Falls Health Care,* 297 NLRB 390, 392 (1989), enfd. 933 F.2d 626 (8th Cir. 1991); *Ohio Masonic Home*, 295 NLRB 390, 393–394 (1989). See also *Lynwood Health Care Center*, *Minnesota, v. NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998) (mere authority to effectively recommend warnings that "have no tangible effect on [an employee's] job status . . . is not sufficient for supervisory status").

[11] See *Green Acres Country Care Center*, 327 NLRB 257 (1999). Under these circumstances, this case is distinguishable from *NLRB v. Attleboro Nursing & Rehabilitation Center*, 176 F.3d 154 (3d Cir. 1999). The nurses in *Attleboro* had the authority to issue both verbal (oral) and written warnings. Further, the warnings were part of a progressive disciplinary system that clearly led from verbal warnings to higher levels of discipline.

[12] As discussed, the program managers also have no authority to issue written warnings or other forms of discipline. Although program managers have recommended such discipline, the record demonstrates that the Employer has either not adopted or ignored the program manager's recommendations. In this regard, Program Manager Donald Hmble testified that he recommended that a resident advisor be discharged, but the community living director disagreed, and gave the employee another chance. Program Manager Melanie Reed testified that she issued verbal warnings to an individual who was a resident advisor. Later, she recommended to her project director that the individual be discharged. The project director and Walker decided to issue a written warning instead, and the individual remained in Reed's group home over her objection. At the time of the preelection hearing, the individual was employed as a program manager at another group home. Program Manager Sandy Millard testified that on two occasions she recommended that employees be transferred after their unsatisfactory behavior continued. Her recommendations were not followed in either case.

[13] The Employer's grievance process is found in its policy and procedures manual.

suggested that Grunder submit a letter to Walker on her behalf. Grunder drafted the letter with Henderson's assistance. Nevertheless, Henderson did not get a raise.

In a second case, Sandy Millard, another program manager, testified about a complaint Lloyd Campbell, a resident advisor, had about restrictions imposed by higher management on his work hours. Millard spoke to her project director about the situation, who directed her to tell Campbell to file a written grievance. The grievance was resolved by the project director and the community living director. On another occasion, Campbell called out sick, and the on-call supervisor criticized him for calling in late. Campbell, upset by the on-call supervisor's tone, complained to Millard. She told him, however, that she could do nothing, and advised him to file a written grievance, which he did not do.

The record also contains examples of how personality conflicts between resident advisors are "handled" by program managers. For instance, Program Manager Melanie Reed testified about one occasion when two resident advisors were stuck in a group home for an extended period of time because of a snowstorm and they began to bicker. They contacted her by phone several times and she offered them several suggestions, including moving to different rooms of the home. The personality conflict between the two resident advisors continued after the storm, and was subsequently brought to the attention of the project director, who resolved the problem. No written grievance was ever filed.[14]

Based on these facts, we agree with the hearing officer that the Employer did not carry its burden of establishing that the program managers adjust grievances. As stated by the hearing officer, the limited authority to resolve minor disputes is insufficient to establish supervisory status. See *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991); *Illinois Veterans Home at Anna, L.P.*, 323 NLRB 890, 891 (1997)*; Ohio Masonic Home*, supra, 295 NLRB at 394. Nor does the authority to resolve personality conflicts or "squabbles" between employees warrant an inference sufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046, 1048 (1997). Contrary to our dissenting colleague, we adhere to these principles.

Moreover, we find that the Employer failed to establish that the program managers actually "resolve" minor grievances. Contrary to our colleague, we therefore find distinguishable both *Attleboro*, supra, and *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998). In *Attleboro*, the court conclusively found that the nurses at issue had the authority to adjust minor grievances and that the nurses had, in fact, resolved disputes between employees involving the "specifics of work assignments and whether they performed their work satisfactorily." *Attleboro*, supra, 176 F.3d at 166. Likewise, in *Passavant*, supra, 149 F.3d at 247–248, the court found that the nurses at issue had the authority to adjust minor grievances regarding assignments, breaktimes, and lunchtimes under a collective-bargaining agreement that defined grievance very broadly. In contrast, the evidence here establishes only that the program managers offer advice and suggestions regarding personality conflicts and bring any minor grievances to the attention of upper management for resolution.[15] Accordingly, we agree with the hearing officer that the program managers do not possess authority under Section 2(11) to adjust grievances.

Secondary Indicia

Finally, in finding the program managers to be statutory supervisors, our dissenting colleague also relies on secondary indicia of supervisory authority. When there is no evidence presented that an individual possesses any one of the several primary indicia of statutory supervisory status enumerated in Section 2(11) of the Act, secondary indicia are insufficient by themselves to establish supervisory status. *General Security Services Corp.*, 326 NLRB 312 (1998), enfd. 187 F.3d 629 (8th Cir. 1998); *Billows Electric Supply*, 311 NLRB 878 fn. 2 (1993). Thus, the factors cited by our dissenting colleague (higher compensation, the perception of others, and the supervisor/employee ratio) are not determinative in this case.[16]

[14] Leigh Ann Kuvlesky, a resident advisor, also testified (based on secondhand knowledge) that her program manager, Tara Simmons, once had to resolve a disagreement between two of her fellow resident advisors.

[15] Compare *Provident Nursing Home*, 187 F.3d 133, 146–147 (1st Cir. 1999) (employees not supervisors where they can resolve minor disputes, but do not have authority to bind management); *Northeast Utilities Services Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994) (employees not supervisors where they can moderate disputes, but do not have ultimate responsibility for resolution of disputes).

[16] In any event, we find that these factors do not cut so clearly in favor of supervisory status as our colleague suggests. For example, the record establishes that several resident advisors earn more money than the program managers. Further, while the Employer's counsel elicited testimony from one resident advisor that she viewed her program manager as her supervisor, another resident advisor testified that he did not view program managers as supervisors. Finally, nothing in the statutory definition of "supervisor" implies that service as the highest ranking employee on site requires finding that such an employee must be a statutory supervisor. See *Training School at Vineland*, 332 NLRB No. 152, slip op. at 1 (2000). See also *VIP Health Services*, supra, 164 F.3d at 649–650 (stating that if an employee "do[es] not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not then automatically confer it"); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (fact that nurses are highest ranking employees on the premises during the evening and night shifts

For these reasons, and the reasons stated by the hearing officer, we agree that that the programs managers are not supervisors within the meaning of Section 2(11) of the Act, and thus we find that they are eligible to vote.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4, shall, within 14 days of this Decision and Direction, open and count the ballots of Patrick Bona, Mary Butts, Melody Dever, Jane Gennaria, Peggy Gomez, Julie Grebe, Dawn Grunder, Deborah Guy, Lis Harris, Donald Hmble, Cheryl Hollins, Joseph Karpinski, Edward Lanyon, Virginia Merke, Sandra Millard, Ed Mulready, Carla Murphy, Cynthia Noble, Lucy Pailen, John Pearson, Brenda Poe-Montgomery, Wendie Price, Regina Reber, Melanie Reed, Mark Schultz, Terri Shaner, Tara Simmons, Sheila Smith, Lora Stull, Cynthia Thornton, Lana Toth, and Pamela Wetzel, and thereafter, prepare and cause to be served on the parties a revised tally of ballots. In the event that the revised tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, the Petitioner's objections will be moot and the Regional Director shall issue a certification of representative.

However, in the event that the revised tally of ballots shows that the Petitioner has not received a majority of ballots cast, the election conducted on January 12 and 13, 2000, will be set aside and the Regional Director will direct a second election.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part.

I agree with the hearing officer and my colleagues that the challenge to the ballot of Cynthia Thornton should be overruled, and that Petitioner's Objection 5 should be sustained and a new election held. Contrary to the hearing officer and my colleagues, however, I find that the Employer's program managers are statutory supervisors and therefore I would sustain the challenges to their ballots. Since I find that the program managers are statutory supervisors, I would also overrule Petitioner's Objection 1 which alleges that before and during the critical period the Employer maintained a policy which prevented or restrained program managers from expressing support for the Petitioner.

The Employer provides social services to adults with developmental disabilities at approximately 62 group homes located in southeastern Pennsylvania and Delaware. The Employer's "Suburban division," the division at issue here, includes 35 group homes located in Chester, Montgomery, and Berks Counties, Pennsylvania. Michael Walker, the Employer's director of day-to-day operations for southeastern Pennsylvania, is in overall charge of the group homes in the Suburban division. Two community living directors report directly to him. There are eight project directors who report to the community living directors. The project directors are each responsible for several group homes. They visit their group homes from one to three times a week and stay at each home for at least an hour on each visit. Each group home is staffed by a program manager and a staff of between two and five resident advisors. The group homes are generally staffed 7 days a week, 24 hours a day.

The Petitioner seeks to represent a unit of approximately 144 full-time and regular part-time employees employed in the Suburban division, including approximately 110 resident advisors, 33 program managers,[1] and 1 assistant program manager.[2] Contrary to the hearing officer and my colleagues, I find that the program managers exercise independent judgment, in the interest of the Employer, to discipline employees and to adjust their grievances and that therefore they are supervisors within the meaning of Section 2(11) of the Act.

It is undisputed that the program managers have the authority to issue verbal warnings to resident advisors and that they have exercised that authority. It is also undisputed that when a program manager issues a verbal warning, he or she documents that warning and the documentation is included in the resident advisor's personnel file at the Employer's main office. Further, a second verbal warning can lead to a written warning. The Employer maintains a progressive disciplinary system under which three written warnings in a 12-month period will result in discharge. Notwithstanding this, the hearing officer found that the program managers' role in the Employer's disciplinary system was only "reportorial"

"does not ipso facto make them supervisors"). Cf. *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1048 (8th Cir. 1998) (where a statutory supervisory is available by telephone or pager, "the highest ranking on-site employee will not invariably be considered a supervisor"). Here, it is undisputed that the on-call supervisor is available.

[1] Two of the program manager positions were vacant at the time of the hearing.

[2] At the time of the hearing, the Employer was phasing out the position of assistant program manager. There is no contention that the assistant program manager is a statutory supervisor.

because he found that no "necessary consequence" flowed from the issuance of the verbal warnings. Hearing officer's report (HOR at 9–10). Thus, the hearing officer found, in effect, that the authority to issue verbal warnings did not come within the ambit of Section 2(11) because there was an insufficient link between the initial stages of the disciplinary system and the later stages (suspension and discharge).

Contrary to the hearing officer, I find that there is a link between the initial stages of discipline in a progressive disciplinary system and the later stages because "it is clear that the initial stages of discipline pave the way for later stages. Absent the initial stages, the more draconian measures of suspension and discharge cannot occur."[3] That this is true here is evidenced by the fact that the verbal warning documentation notices in evidence state on their face that "[a]ny further violation of Ken-Crest policies or procedures will result in further disciplinary action which may include discharge." Further, the four verbal warnings submitted into evidence (see Emp. Exhs. 12 and 17) include, as part of the write-ups, the fact that continued failure to take the action under review "will result in further disciplinary action" or "will result in progressive disciplinary action." Finally, one of the verbal warnings included in Employer Exhibit 12 states that failure to take the action under review "will result in further disciplinary action, including suspension without pay." In my view, these verbal warnings clearly establish that there is a linkage between the early stages of the Employer's progressive disciplinary system and the later stages of that system, i.e., that the issuance of the verbal warnings may result in job consequences. It is no answer to say, as my colleagues assert, that not all verbal warnings will necessarily lead to job consequences. It is enough to say that verbal warnings can lead to such consequences. In these circumstances, I find that the program managers, who have the authority to issue verbal warnings, are supervisors within the meaning of Section 2(11) of the Act.

It is also undisputed that the program managers have the authority to adjust grievances. While the Employer has a written grievance procedure under which the written grievances go directly to higher management officials above the level of the program managers, the Employer's grievance procedure stipulates that "prior to initiating the grievance process," resident advisors are directed to discuss the matter with the program managers.

The hearing officer found that the program managers have, in fact, resolved the grievances of resident advisors. However, relying, inter alia, on *Rivertrace Health Care Center*, 304 NLRB 861, 865 (1991), he found that the resolution of such "minor" grievances was not sufficient to establish supervisory status under the Act. The hearing officer then went on to acknowledge that the Third Circuit, the circuit in which this case arises, has held that the authority to resolve minor disputes does, in fact, evidence the possession of Section 2(11) supervisory authority. However, he sought to distinguish the court's finding of supervisory authority in one of those cases, *NLRB v. Attleboro Nursing & Rehabilitation Center*, 176 F.3d 154 (3d Cir. 1999), a case relied on by the Employer. The hearing officer opined that the asserted supervisors there had the "actual authority to adjust the grievance" while here it was not clear "that the Program Managers' intervention involved any authority beyond that of a mediator." (HOR at 11.) The hearing officer also sought to distinguish *Attleboro*, supra, on the ground that while the grievances at issue in that case concerned disputes that involved actual work duties and assignments the disputes in issue here arose from personality clashes. (HOR at 11.)

As an initial matter, I agree with the Third Circuit that "the adjustment of even minor grievances is enough to support a finding of supervisory authority." *Attleboro,* supra, 176 F.3d at 166, quoting *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243, 248 (3d Cir. 1998). Section 2(11) does not distinguish between major and minor grievances. Further, in resolving "minor" grievances, the program managers must use independent judgment to settle these grievances before they become "major" grievances that are set out in writing and pass through the Employer's formal grievance process. In addition, it is surely in the interest of the Employer to have these minor grievances resolved as expeditiously as possible by the program managers so that the morale of the resident advisors and the smooth operation of the group homes are not adversely affected by lingering personality clashes and disputes.

Contrary to my colleagues, I find that the Third Circuit's analysis of this issue, as set out in its opinion in *Attleboro*, supra, is applicable here. I disagree with the hearing officer's view that the fact situation here is distinguishable from that in *Attleboro,* supra, and therefore requires a different result. The hearing officer found that the program managers are "mediators." However, a mediator is a person who tries to get two or more disputants to resolve an issue between them. In the instant case, the program managers, acting on behalf of management, can themselves resolve the grievance against management.

Second, even if the dispute is between two employees, the result is the same. The hearing officer attempted to

[3] *Green Acres Country Care Center*, 327 NLRB 257, 258–259 (1998) (Chairman Hurtgen dissenting).

distinguish two types of minor grievances, i.e., those that are work-related and those that are personal. I find that the hearing officer did nothing more than create a false dichotomy that has no support in fact or law. As a matter of fact, since the personal disputes that may arise among the resident advisors occur in the workplace, they are work-related, and they do, in fact, affect the workplace. Clearly, lingering personal disputes amongst the resident advisors can adversely affect both their morale and the smooth operation of the group homes. Therefore, such grievances are just as work-related as disputes over work assignments and work performance.

The court's opinion in *Passavant,* supra, is consistent with this view. It draws no distinction between the resolution of personal disputes between employees and the resolution of disputes between an employee and management. The court noted the Board's view that the alleged supervisors sometimes use their personal relationship with employees to resolve a dispute. However, in the court's view, this is insufficient to deny supervisory status.

Finally, in finding that the program managers are statutory supervisors, I also rely on secondary indicia of supervisory authority. The highest paid program managers make more than the highest paid resident advisors. The resident advisors regard the program managers as their supervisors. If the program managers were not supervisors, the group homes, which, as noted above, are open 24 hours a day, 7 days a week, would be without direct supervision except during the visits of the project directors, i.e., for all but a few hours each week.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD